

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs November 6, 2007

STATE OF TENNESSEE v. JEREMY C. WATKISS

Direct Appeal from the Criminal Court for Jackson County

No. 00-164 J.O. Bond, Judge

No. M2005-01003-CCA-R3-CD - Filed February 29, 2008

The defendant, Jeremy C. Watkiss, was convicted of passing a forged instrument in an amount greater than \$10,000 but less than \$60,000, a Class C felony. He was sentenced as a Range I standard offender to three years and ordered to serve ninety days in jail and six years on supervised probation. On appeal, the defendant argues that the trial court erred by admitting an affidavit of forgery into evidence in violation of the Confrontation Clauses of the Tennessee and United States Constitutions, and in violation of the Tennessee Rules of Evidence pertaining to admission of hearsay statements. Upon review of the record and the parties' briefs, we dismiss the defendant's appeal for failure to file a timely notice of appeal.

Tenn. R. App. P. 3 Appeal as of Right; Appeal Dismissed

J.C. McLIN, J., delivered the opinion of the court, in which THOMAS T. WOODALL and JAMES CURWOOD WITT, JR., JJ., joined.

Michael R. Giaimo (on appeal), Livingston, Tennessee, and Thomas H. Bilbrey (at trial), Assistant Public Defender, Lafayette, Tennessee, for the defendant, Jeremy C. Watkiss.

Robert E. Cooper, Jr., Attorney General and Reporter; Lacy Wilber, Assistant Attorney General; Tom P. Thompson, Jr., District Attorney General; and Howard Lee Chambers, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. BACKGROUND

The following evidence was presented at trial. Margaret Philpot testified that she is head teller at the Citizens Bank in Gainesboro, Jackson County, Tennessee. She stated that in August of 2000, the defendant, Jeremy C. Watkiss, presented a check in the amount of \$17,642.00 to a teller at the Citizens Bank. Ms. Philpot also identified an accompanying deposit slip in the name of Jeremy C. Watkiss or Lisa Watkiss which showed a deposit in the amount of \$14,000. Photographs of the defendant at the teller's station were admitted into evidence. Ms. Philpot testified that she did

not wait on the defendant and did not assist in the transaction. Ms. Philpot stated that the check submitted by the defendant was initialed by a bank officer per standard bank operating procedures.

Ms. Philpot testified that Citizens Bank also kept a file of the transaction which included an endorsed forgery affidavit. Ms. Philpot stated that the forgery affidavit was a form kept by the bank and routinely used in the course of business to report a forgery. This affidavit is completed by bank employees or officers whenever a forgery event occurs. It is signed at the bottom by the bank employee who completes the affidavit. Defense counsel objected to Ms. Philpot's testimony about the forgery affidavit on the grounds that the affidavit constituted inadmissible hearsay and a proper foundation for its admission into evidence had not been laid. Despite the continued objection of defense counsel, the court ruled that the forgery affidavit was a business record which fell under the hearsay exception for business records and therefore could be admitted into evidence.

Kathy White testified that she worked for Wells Fargo Financial in Cookeville, Tennessee. She stated that in April of 2000, Fidelity Financial merged with Wells Fargo to form Wells Fargo Financial.¹ At the time of trial, Ms. White was an administrative assistant responsible for keeping business records at the bank. She testified that bank policy required a customer who financed his or her vehicle through Fidelity Financial to carry insurance on that vehicle. According to her testimony, the defendant was indebted to Fidelity Financial for four different vehicles, including one 1997 truck. She stated that no report was submitted to the bank reflecting that the truck had been in an accident. She also identified a check listing Lisa J. Watkiss, Fidelity Financial and Auto Mart-Autobody as payees. She stated that Fidelity Financial did not sign the check. She summarized the bank's policy regarding payment of accident claims on vehicles financed through the bank as follows:

Usually we have a knowledge that the vehicle has been either wrecked or totaled, normally by the customer or the insurance that would call to get a copy of the title to make sure we had it. Then we require the person that the check would be written to, to come to the office. If we don't know them, we'll ask for identification. They sign the check over to us. We receipt the check in and then we cut a check out from Wells Fargo to, in this case, I believe Auto Mart, Auto Body. And it would take the customer out and take the insurance company check over and it would be a check from Wells Fargo to the place of repair.

Ms. White also testified that when Fidelity Financial endorsed checks, it used a stamp on the back of the check for verification. This stamp was not affixed to the check at issue. She stated that the bank did not like to release third party checks. The normal practice was not to list the customer as a payee, but rather, to have the insurance company make out the check for repairs to the bank alone. She also testified that the bank was never paid and never received any information on the

¹ Although Fidelity Financial bank merged with Wells Fargo bank to form Wells Fargo Financial, we will continue to refer to the bank at which the defendant financed the vehicle in question, a 1997 Ford F350 pickup truck, as Fidelity Financial for ease of reference.

location or status of the defendant's vehicle. On cross-examination, Ms. White admitted that her testimony was based solely on a review of the business records and that she was not familiar with the branch in question, or with the defendant prior to trial.

The defendant testified that he had done business several times with Fidelity Financial and that the bank carried loans on several of his vehicles. He stated that his 1997 Ford F350 was wrecked in August of 2000. He filed a claim with the insurance company and received a check in the mail for \$17,642.00 to repair the truck. He also stated that he "guessed" his wife signed the check, and that he ran by Fidelity Financial bank because "they knew he intended to fix the truck." He identified his signature and his wife's signature on the back of the check. When asked how Fidelity's signature appeared on the check, he recalled that Kathy, a girl at the bank with black hair, endorsed the back of the check for Fidelity Financial. After Fidelity Financial endorsed the check, the defendant went to Citizens Bank where a woman by the name of Vickie assisted him. According to the defendant, Vickie verified the information with Auto Mart and Fidelity, and took the check back to bank officer Jay Cassity who signed it and deposited the check. The defendant testified that it was his signature on the deposit slip for \$14,000. He further admitted that he took the remaining \$3,642.00 and paid bills with the money.

On cross-examination, the defendant admitted that he was in bankruptcy when the transaction took place. He stated that he initially filed a Chapter 13 bankruptcy and made payments to keep his possessions. He admitted that he was later forced to convert to a Chapter 7 bankruptcy, which required him to liquidate his assets in order to satisfy and discharge the bankruptcy. The defendant was unsure whether he was in Chapter 13 or Chapter 7 at the time he deposited the \$14,000 into his own account. When asked if Fidelity Financial ever received repayment from the \$14,000 given to him by the bank to repair the truck, the defendant stated that several money orders were paid to Fidelity Financial. However, the defendant testified that he had no proof of this because his records were in federal bankruptcy court. When asked if he ever reported the wreck to Fidelity Financial, the defendant stated that he believed the insurance company had reported the wreck to the bank. He also stated that the truck still had not been fixed, still belonged to the bank, and could still be fixed for approximately \$8,000 or \$9,000. The defendant testified that someone from the bank even came to the garage where it was being held and looked at the truck but decided not to reclaim it. The defendant testified that his bankruptcy attorney negotiated an agreement with the bank in which the defendant would make payments of \$425.00 per month to Fidelity Financial in repayment on the check. Kathy White was called as a rebuttal witness by the prosecution and testified that she could find no record of any such agreement or of receipt of any payments from the defendant.

Based on the evidence at trial, the jury convicted the defendant of one count of passing a forged check in the amount of \$17,642.00. The defendant was sentenced to three years as a Range I standard offender for a Class C felony.² He was ordered to serve ninety days, and the remainder

² The judgment form reflects that the defendant was convicted of a Class E felony. However, the state acknowledges that there is a clerical error in the judgment form, and that based upon the nature of the offense, passing
(continued...)

of his sentence was suspended so long as he complied with the terms of probation for six years and paid restitution. The jury verdict was announced on August 25, 2003. The defendant was sentenced on November 3, 2003, and the judgment of conviction was filed by the trial court clerk on November 6, 2003. On December 2, 2003, the defendant filed a motion for new trial. The court heard the defendant's motion on January 21, 2005, and an order denying the defendant's motion for new trial was entered on January 27, 2005. Subsequently, an identical order denying the defendant's motion for new trial was entered on April 18, 2005. On April 20, 2005, the defendant filed his notice of appeal with this court.

II. ANALYSIS

The defendant argues that the trial court erred by admitting a forgery affidavit at trial in violation of the Confrontation Clause of the Tennessee and United States Constitutions, and in violation of the Tennessee Rules of Evidence regarding admission of hearsay statements.

In lieu of addressing the issues raised by the defendant, we are forced to address the defendant's failure to timely file a notice of appeal. Pursuant to Tennessee Rules of Appellate Procedure 4(a), a notice of appeal "shall be filed with and received by the clerk of the trial court within 30 days after the date of entry of the judgment appealed from[.]" The untimely filing of a notice of appeal is not always fatal to an appeal. As stated in Rule 4(a), "in all criminal cases the 'notice of appeal' document is not jurisdictional and the filing of such document may be waived in the interest of justice." Tenn. R. App. P. 4(a). "In determining whether waiver is appropriate, this Court will consider the nature of the issues presented for review, the reasons for and the length of the delay in seeking relief, and any other relevant factors presented in the particular case." *State v. Markettus L. Broyld*, No. M2005-00299-CCA-R3-CO, 2005 WL 3543415, at *1 (Tenn. Crim. App., at Nashville, Dec. 27, 2005). Waiver is not automatic and should only occur when "the interest of justice" supports waiver. *State v. Scales*, 767 S.W.2d 157, 158 (Tenn. 1989). If this court were to summarily grant a waiver whenever confronted with untimely notices, the thirty-day requirement of Tennessee Rule of Appellate Procedure 4(a) would be rendered a legal fiction. See *Michelle Pierre Hill v. State*, No. 01C01-9506-CC-00175, 1996 WL 63950, at *1 (Tenn. Crim. App., at Nashville, Feb. 13, 1996).

Upon review of the record, we note that the defendant filed his motion for new trial on December 2, 2003. The trial court heard the defendant's motion on January 21, 2005, and the court's initial order denying the defendant's motion for new trial was filed on January 27, 2005. An identical order denying the motion for new trial was filed with the court on April 18, 2005. The defendant filed his notice of appeal on April 20, 2005, nearly three months after entry of the original

²(...continued)

a forged instrument in an amount greater than \$10,000, but less than \$60,000, the defendant is thereby guilty of a Class C felony.

order.³ The notice of appeal in this case should have been filed within thirty days of the entry of the January 27, 2005 order.

The defendant asserts in his brief that he “timely filed a Notice with the Clerk of the Criminal Court evidencing his intention to appeal to this Court his sentence.” However, the defendant makes no argument and no citation to the record or relevant authority explaining why the notice of appeal was filed more than thirty days late. Furthermore, there is no indication from the record that the defendant filed a reply brief after the state challenged the timeliness of the notice of appeal. We determine to follow the Tennessee Rules of Appellate Procedure in this case. *See* Tenn. R. App. P. 4(a). There is nothing in the record to suggest that the defendant is entitled to waiver; therefore, we dismiss the defendant’s appeal.

CONCLUSION

Based upon the foregoing authorities and reasoning, we dismiss the defendant’s appeal.

J.C. McLIN, JUDGE

³ Upon review, we note that there is no evidence in the record which explains the filing of two identical orders. We also do not see anything in the appellate record which explains why the court took more than a year to address the defendant’s motion for new trial. However, the defendant was still obligated to file a notice of appeal within thirty days of the court’s entry of the first order denying the motion for new trial.